1216.

SUPREME COURT OF THE UNITED STATES.

No. 177.

WILLIAM NEVES AND JAS. C. NEVES, APPELLANTS,

vs.

WILLIAM F. SCOTT, RICHARD ROWELL.

ON APPEAL FROM THE CIRCUIT COURT U. S. FOR THE DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Bill of complaint	1	2
Subpœna and marshal's return	15	10
Exhibit A, referred to in complainants' bill	17	11
" B, " "	20	12
Demurrer of Wm. F. Scott	59	32
" Richard Rowell	60	33
Opinion of the court	62	34
Decree	70	39
Appeal bond	71	40
Citation and service	72	40
Certificates of clerk and judge	73	41
Affidavit of Geo. Glen, clerk	74	41

J. & G. S. Gideon, printers.

Bill of complaint.

In the sixth circuit court of the United States for the district of Georgia.

To the judges of the circuit court of the United States for the district of Georgia:

William Neves, of Henry county, in the State of Alabama, and a citizen of the State of Alabama, and James C. Neves, a citizen and resident of the State of Mississippi, bring this their bill against William F. Scott, of Baldwin county, in the State of Georgia, and Richard Rowell, of Baldwin county, in said State of Georgia, and a citizen of said State of Georgia.

And thereupon your orators complain and say, that in the year of our Lord 1810, one John Neves, the brother of your orator William, being possessed of a large estate, and one Catherine Jewell, widow and relict of one Thomas Jewell, then deceased, being also possessed of a considerable property, they, the said John and Catharine, being childless and unmarried, did, in the year 1810, in contemplation of, and in consideration of a marriage, then shortly to take place between the said John and Catharine, mutually agree and covenant together, and with each other, under their hands and seals, to the effect following, viz , that all the property, both real and personal, that then belonged of right, or should thereafter belong of right, to each or both, the said John and Catharine, should remain in common between them, the said John and Catharine, when husband and wife, during their natural lives; and on his or her death to remain with the survivor, and at the death of the survivor, to be divided equally between the heirs of him, the said John Neves, and the heirs of her, the said Catharine, share and share alike, each half to be distributed according to the laws of Georgia in cases of intestacy. And your orators show to your honors, that very shortly after the execution of said agreement and covenant in writing, (a copy of which is herewith filed as an exhibit, marked A, which your orator prays may be taken as part of this his bill, with leave of reference as often as necessary,) the said John Neves and the said Catharine Jewell, in the said year 1810, intermarried in pursuance of their contract and intention, as expressed in said deed of marriage settlement.

Orator further shows to your honors, that in pursuance of said deed, the said John and Catharine, after said intermarriage, held their property in common; that said John purchased many slaves, and other property, and otherwise largely increased the amount and value of the property so held in common; and that in the year 18 , one Mrs. Pine, sister of the said Catharine, departed this life, leaving a will, by which she devised and bequeathed to the said Catharine, then living with her husband, the said John, several negro slaves, and other personal property, viz., also certain real estate, viz., all of which went into the possession of the said John and Catharine during their joint lives.

Your orators further show to your honors, that on the day of 1828, the said John Neves departed this life, never having had children,

leaving your orator his sole surviving brother, and as your orator is advised and believes, the sole heir at law of him the said John, he never having had any brother or sister, save your orator and one James Neves, who died many years prior to the death of the said John, leaving an only child, infant, in the State of Tennessee, named James C. Neves, your orator.

Orators further show to your honors, that at the death of said John Neves, he was not in debt, and left a large estate in said county, Baldwin, consisting of over one hundred negro slaves, and several hundred head of cattle and sheep, sixty head of horses, thirty mules, several asses, four hundred head of hogs, one hundred bags of cotton, several thousand bushels of corn, several hundred bushels of wheat and oats, several carts and wagons, a carriage, harness, and pair of carriage horses, an abundance of plantation tools, domestic fowls, household and kitchen furniture, several thousand dollars in money, many debts due him, a large and valuable plantation in Baldwin county, a plantation and mills thereon in Wilkinson county, and several tracts of land in other counties in said State of Georgia, all of the value of one hundred thousand dollars, or other very large sum.

Your orators further state, that after the death of said John Neves, all of said property remained in the possession of her, the said Catharine, until her subsequent intermarriage with the Scott, except such as she disposed of to her own use. Your orators are informed and believe, that said Catharine, during her widowhood, disposed of some of the personal estate, and also of the plantation and mills in Wilkinson county, for three thousand dollars, or some such amount. Your orators further show, that in the year 1835 the defendant, Scott, intermarried with the said Catharine, and by virtue of such intermarriage took possession, jointly with the said Catharine, of all the said estate so held by the said Catharine after the death of the said John Neves; that several of the negroes were sold, and some exchanged for others, by said Scott; and that he disposed of much of the lands belonging to said estate.

Your orators further show to your honors, that on the day of September, 1844, the said Catharine died without ever having had issue, and leaving the said William F. Scott the sole heir at law of her half or share of said estate.

Your orators further show to your honors, that at the time of his intermarriage with the said Catharine, the said Scott was wholly insolvent, and largely indebted, with no property, save his salary as an overseer for the said Catharine, prior to their marriage, and that he used a large amount of the money and proceeds of said estate, in payment of such debts; and that he purchased several slaves and other personalty, and several valuable plantations and tracts of land with the money and proceeds of said estate, as orator is informed and believes; and that he boarded, clothed, and educated his three children out of the money and proceeds of said estate.

Your orator further states, that at the death of the said Catharine the estate of the said John Neves, which came to the sole possession of the

said Scott, and subject to a division under the deed of marriage settlement aforesaid, amounted to over one hundred thousand dollars, or other very large sum; and consisted, as orator is informed and believes, of about one hundred and thirty negroes, a large sum of money in cash, about five hundred head of cattle, four hundred sheep, seventy horses, and mules, and asses, one hundred bags of cotton, weighing one hundred and fifty pounds apiece, ten thousand pounds of fodder, three thousand bushels of oats, one hundred bushels of wheat, several carts, ploughs, *ploughs*, wagons, hoes, and abundance of other plantation tools, fine carriage and harness, and pair carriage horses, four hundred hogs, many domestic fowls, household and kitchen furniture, a valuable plantation in Baldwin county, whereon said Catharine lived and died, consisting of several thousand acres, and several tracts of land elsewhere, and a house and lot in Milledgeville, derived from her said sister, Mrs. Pine, besides what property said Catharine and defendant Scott have disposed of since the death of said John Neves.

Your orators further show to your honors, that he is unable to state the names, ages, or values of said negroes; nor can he give a more certain description and quantity of the property pertaining to said estate; nor is he able to state with certainty what part of said estate said Scott and said Catherine, or either, disposed of to his or her own use or otherwise, nor what part he purchased or acquired with the moneys or proceeds of said estate, for the reason that the said Scott and Catherine, during her lifetime, and the said Scott, since her death, have studiously, so far as in them lay, concealed and kept all such information from your orator, and he believes he will be unable to obtain such information save by resorting to the conscience of said Scott in this honorable court.

Your orators show to your honors, that he has often requested the said Scott to show and produce to your orator a correct schedule of all the names of the negro slaves in his possession at the death of said Catherine, their ages, and values, a list of all the balance of said estate, real and personal, whether consisting of money, lands, choses in action, or other valuable thing, and that he come to an amicable and equal division thereof, between himself and your orator, agreeably to the provisions of the said deed of marriage settlement; but to do this he, defendant, has hitherto refused, unless orator will indemnify him against the contingency of the appearance of said James C. Neves, son of said James Neves, orator's deceased brother; also against a pretended claim of one Richard Rowell, the other defendant. The said Scott also contends that such of said estate as was acquired subsequently to the death of the said John Neves, and especially such as was derived through Mrs. Pine, sister as aforesaid, of the said Catherine, and all such as he, Scott, acquired in his own name since his said intermarriage with the said Catherine, is not subject to division. Your orators are advised and believe, that by the provisions of the said deed of marriage settlement, all the property of every kind, however acquired by said John Neves and Catherine, while both in life, and by said Catherine, as survivor, is subject to division between their heirs; and as to such as has been

acquired or purchased by said Scott, as moneys, as profits, or proceeds arising from said estate, the same also is thus subject to a division; and that said Scott is bound in equity to account to your orator also for all such money, or other thing of said estate, as he has appropriated to his own use, or that has gone to pay his debts.

Your orators are advised and believe, that said Scott, by virtue of his said intermarriage with said Catharine, acquired no greater or higher right or power over said estate, so far as your orator's rights are concerned, than a steward or overseer in the employment of the said Catharine would have acquired; nor had the said Catharine any but a usufruct interest in said estate, which ended with her life.

And as to the pretended claim of the said Richard Rowell, the other defendant, your orators are advised and believe, that it has no foundation either in law or equity, and so said Scott has often expressed himself to your orator and others, so that said claim ought not to deter said Scott from delivering over said property to your orator.

Your orators further show to your honors, that when on his deathbed, and when the said John Neves was *in extremis*, the said Richard Rowell, (as orator has been informed by those who were present and witnessed the scene, and whose testimony orator verily believes,) taking advantage of the prostration of body and mind of the said John Neves, caused him, the said John, to be taken forcibly from his deathbed in his own house, and in the midst of his family, and conveyed by slaves to the house of him, the said defendant Rowell, some miles off, in county Baldwin, where he procured the said John Neves, while thus in a dying condition, to sign an instrument prepared by him, the said Richard Rowell, purporting to be a will of him, the said John Neves, devising and bequeathing one-half of his estate to George, son of the said Richard Rowell, and that immediately thereafter the said John Neves expired, when his corpse, no longer useful to the said Richard or his family, was returned from whence it had been taken a few hours before, with permission to his wife to bury it! But your orators care not to enter into an investigation or litigation touching this most melancholy and disgusting affair, for they are advised it cannot affect your orator's rights as claimed under said deed of marriage settlement one way or the other, whether said will be valid or invalid, fraudulent or honest; for that your orator's rights as vested under said deed were secure from all attempts from any quarter to divest them, and he has thus noticed the manner in which said pretended will was obtained to exclude a conclusion of your orator's admission of its validity. Your orator, however, admits and states, that such a will was thus made, proven in common form and recorded, and that said Richard Rowell, as sole acting executor of said will, claims one-half of said estate adversely to your orator.

Your orators further show to your honors, that they are advised and believe, that both said defendants are estopped from disputing your orator's rights as vested under and by virtue of said deed of marriage settlement, or from recognising or setting up as against your orator said

will of the said John Neves, or the said claim under it; because orator is informed and believes, that it has been heretofore judicially and finally adjudicated in the superior court of judicature, in and for county Baldwin, in said State of Georgia, before the honorable Thomas W. Cobb, judge of said court; that said deed of marriage settlement was and is valid and binding on all parties thereto and their representatives, and that the same was not, nor is, affected or controlled by said will of said John Neves; which adjudication took place in a proceeding on the equity side of said superior court, wherein the said Catharine, then Catharine Neves, was complainant, setting up and insisting on said deed of marriage settlement as paramount to said will, and said Richard Rowell was defendant, insisting and contending in defence to said suit; and afterwards as complainant in a cross bill, that said will controlled said deed, and that he, as executor to said will, had a right to the immediate possession of said estate, devised and bequeathed therein; to which proceedings *pendente lite* the other defendant, William F. Scott, as husband of said Catharine, was made a party complainant with her. Abstracts from the records of said proceedings are filed herewith, as exhibits marked B, and which orator prays may be taken as part [of] this his bill, with leave of reference as often as necessary.

Your orators further show to your honors, that the original deed of marriage settlement, a copy of which is exhibit A, is in defendant Scott's possession, or [in] the possession of his attorneys or solicitors, or one or some of them, and which your orator prays he may be required by this honorable court to produce in court on the hearing of this bill, and on necessary occasions during this investigation for inspection of all interested.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say:

1st. Whether said deed of marriage settlement was not executed by said John Neves and Catherine Jewell as stated, and at the time stated; and is not exhibit A a copy thereof, and where is the original; have you or not ever, and when, seen it?

2d. Whether the said John Neves and Catherine Jewell did not intermarry in 1810, and live together as husband and wife until the death of said John in 1828?

3d. Whether the estate held in common between said John and Catherine was not largely increased during their joint lives?

4th. Whether the said Mrs. Pine, sister of said Catherine, did not as stated will certain, and how many, negroes to the said Catherine; what were their names, ages and value, and what their increase; and also other, and what, property, real and personal; and did not the property so wil-

led or given go into possession of said John and Catherine, during their joint lives; and was not the same held in common as their other property?

5th. Whether said John Neves did not die in 1828, and what month; never having had child or children?

6th. Whether said John Neves ever had any brother or sister, save your orator and the said James Neves; and did not said James die many years prior to the death of said John?

7th. Whether said James did not leave an only child, infant son, James C. Neves?

8th. Whether said John Neves, at the time of his death, was not free from debt, and did he not leave a very large estate, real and personal, in the possession of the said Catherine, his relict, worth one hundred thousand dollars, or how much?

9th. Whether he did not leave a large number of negro slaves; how many; what were there names, ages, and value; what their increase; thier names, value, and increase.

10th. Whether he did not leave a large quantity of real estate, and what, and how much, and what money, and other personalty?

11th. Whether said John Neves did not leave the amount and description of property as stated in said bill; what property did he leave?

12th. Whether at and after the death of the said John Neves, all his said estate did not remain in the sole possession and control of his widow, the said Catherine, until her intermarriage with defendant Scott, except such as she disposed of to her own use?

13th. Whether said Catherine, after death of said John Neves, did not dispose of some, and what, and how much, and what value of said estate, and especially the said Wilkinson plantation and mill, and for how much?

14th. Whether said defendant Scott did not, in 1835, and what month, intermarry with the said Catherine, widow of the said John Neves?

15th. Whether after and by virtue of said intermarriage, said defendant Scott did not go into possession of the property, real and personal, of said estate, jointly with said Catherine?

16th. Whether said defendant Scott did not, after his said intermarriage and possession, sell some and exchange others of said negroes, and which; what were their names, ages, and value; and did he not sell or dispose of other of the property, and what, and some of the lands, and which, how much, and for what price?

17th. Whether said Catherine did not die in September, 1844, as stated, leaving said Scott her sole heir?

18th. Whether at the time of intermarriage of said Scott and Catherine, he was not wholly insolvent and largely indebted, with no property save his salary as overseer for said Catherine?

19th. Whether said Scott after his intermarriage with said Catherine did not pay some, and what, amount of debts by him owing at the time of his said marriage, with the moneys belonging to, or proceeds arising from, said estate, to which he as aforesaid came to possession on his said marriage?

20th. Whether said Scott has not, from time to time, since his said intermarriage with said Catherine, purchased negroes and other personal property and real estate, with the moneys belonging to the said Catherine or to said estate, or with proceeds and profits accruing from said estate? If nay, from whence did he obtain the funds to make such purchases?

21st. Whether at the death of said Catherine, the said estate left by the said John Neves and the said Catherine was not of the value of one hundred thousand dollars; if not, how much?

22d. Whether said estate left by said Catherine in the possession of the said Scott did not consist of one hundred and thirty negroes? If nay, how many; what were the names, ages, and value, of all and each of the negroes left by said John Neves and said Catherine, and what has been their increase, and what has been the value of their hire since the death of said Catherine; what other personal property or thing of value, and what lands or real estate, did said Catherine leave, and the value of each, and what has been its rents or profits since her death?

23d. Whether your orators have not repeatedly required the said Scott to deliver over the one half of said estate as belonging to your orators under said deed of marriage settlement, and did he not refuse for the reasons herein stated?

24th. Whether the said Scott has not refused to furnish your orators with a correct schedule of all said property and estate, as it existed at the death of the said Catherine?

25th. Whether the said Scott and said Catherine did not use of the moneys and proceeds of said estate, as much in value in paying Scott's individual debts as would amount to whatever in value he brought into the said estate of his own funds, independent of said estate; and did not said Scott board, clothe, and educate his three children out of the proceeds and moneys of said estate?

26th. Whether said defendant Scott has not often, or at any time, declared that he did not look upon the other defendant Rowell's claim to one half said estate of any validity.

27th. Whether said Richard Rowell did not procure said pretended will of the said John Neves, to be executed in the manner and through the means as stated?

28th. Whether said defendant Richard Rowell is not the sole acting executor of said will of said John Neves; and whether he ever took possession of said estate, by virtue of said will, or any thereof, and does he not claim one-half of said estate as stated?

29th. Whether all debts due by and to the said John Neves have been paid and settled, and by and to whom?

30th. Whether such proceedings as stated were had in the superior court of Baldwin county, in said State of Georgia; and is exhibit B a correct abstract thereof?

Prayer.

And that said William F. Scott may be decreed to file, with his answer in this court, a full and complete schedule of every item and article of personal property, names of all the negroes, deeds and other muniments and evidences of title to the real estate, which was claimed or possessed by the said Scott and the said Catherine at the time of her death and the increase thereof; designating all such as is of the estate of the said John Neves, or the increase of said estate; or that has been purchased with the proceeds of said estate, and also a statement of all that has been sold or disposed of, either by the said Scott or said Catherine, since the death of said John Neves, and its value; and also of all such property as is claimed to belong to said Scott in his own right, but connected or mixed with the property of said estate, and a statement of from whom, and how such property was acquired.

And that commissioners be appointed by this honorable court to divide all such property as pertains to the estate of the said John Neves and the said Catherine Scott, formerly Catherine Neves, widow of said John, equally between your orator and the said William F. Scott, either in kind, or that the same be sold, and the money thereby arising be thus divided, as shall be deemed most equitable and agreeable to equity.

And that said Scott be decreed to account for, and pay over to orator, one-half of the value of all such property as he the said Scott or the said Catherine may have sold or disposed of since the death of the said John Neves, saving such of the crops and proceeds as were necessary for the support of the said Catherine and her husband. And that said Scott be decreed to account and pay over to your orator one-half of the value of the hire and use of all the slaves and other personalty, and one-half of the value of the rent of the real estate, which is *of* has been derived from said estate in question, to be computed from the death of the said Catherine; and that your honors would decree that said John Neves had no right to convey by will said property.

And that said other defendant, Richard Rowell, be restrained positively, by an injunction of this honorable court, from laying claim to, or from molesting your orators in the quiet enjoyment of said one-half of said estate thus to be assigned to your orator.

And for further relief, may it please your honors to grant unto your orator a writ of subpœna, to be directed to the said William F. Scott, of Baldwin county, in the State of Georgia, thereby commanding them and each of them, at a certain day and under a certain pain therein to be inserted, personally to be and appear before your honors in this honorable court, on the rule day for March, 1845, in the city of Savannah, then and there to answer the premises, and to stand to, and abide by, such order and decree therein as to your honors shall seem agreeable to equity and good conscience. And your petitioner will ever pray, &c.

SEABORN JONES,
SAM'L T. BAILEY,
Solicitors for Complainant.

Note of Interrogatories.

Scott. The defendant William F. Scott is required to answer the interrogatories numbered, respectively, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30.

Rowell. The defendant Richard Rowell is required to answer the interrogatories numbered, respectively, Nos. 1, 5, 8, 9, 10, 11, 12, 15, 21, 27, 28, 29, 30.

JONES & BAILEY,
Solicitors for Complainant.

Service of amendment acknowledged, 16 May, 1845.

ROB'T M. CHARLTON,
Solicitor for W. F. Scott.

F. H. CONE,
Solicitor for Richard Rowell.

Bill and exhibits A and B, filed February 3d, 1845, at rules.

G. GLEN, *Clerk.*

UNITED STATES OF AMERICA, *District of Georgia:*

In the sixth circuit court of the United States, for the district of Georgia.

[L. S.] Geo. Glen, Clerk.

The President of the United States, *to the* to William F. Scott and Richard Rowell, of Baldwin county, in the State and district of Georgia:

You are hereby commanded that, laying all other matters aside, you appear at the clerk's office of the said court in the city of Savannah, at rules, to be had on the first Monday in March next, to answer to a bill of complaint, and for discovery, relief and partition, exhibited against you in the said court by William Neves of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five hundred dollars.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this third day of February, in the year of our Lord eighteen hundred and forty-five.

JONES & BAILEY,
Complainant's Solicitors.

The defendants must enter their appearance in this suit at the clerk's office, on or before the rules in March next, otherwise the bill will be taken pro confesso.

Served a copy of this subpœna on William F. Scott and Richard Rowell, defendants, by leaving them at their usual place of residence, this 19th day of February, 1845.

H. WILLINGHAM, *U. S. Marshal.*

Exhibit A.

GEORGIA, *Baldwin county:*

Articles of agreement made and entered into this seventeenth (17) day of February, in the year one thousand eight hundred and ten, (1810) between John Neves and Catharine Jewill, widow and relict of the late Thomas Jewill, (deceased,) all of the State and county aforesaid, are as follows, (viz:)

Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewill as aforesaid, are as follows, (to wit:) That all the property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided.

And on the other hand should the said John become the longest liver, the property to remain in the manner and form as above.

In witness whereof, the said John and Catharine hath hereunto set their hands and affixed their seals the day and year above written.

JOHN NEVES, [L. S.]

her
CATHARINE X JEWELL. [L. S.]
mark

Test:
CORNELIUS MURPHEY,
JESSE WARD.

Baldwin superior court, July term, 1835.

Copy verdict.

CATHARINE NEVES,
vs.
RICHARD ROWELL,

Bill in equity and for injunction.

We, the jury, find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death; and we further find that the complainant do pay to defendant the sum of nine hundred and two $\frac{75}{100}$ dollars, which have been allowed by the special jury at this term, upon an appeal from the court of ordinary, as expenses and costs incurred by the defendant in proving the will of John Neves, dec'd, and resisting the marriage contract between John Neves and Catharine Neves, his wife; and we further find for the complain't the costs of suit.

S. BOYKIN, *Foreman.*

GEORGIA, *Baldwin county:*

I, William Steele, clerk of the superior court of the county aforesaid, do certify, that the extract on the two foregoing pages are truly copied from the records and files of my office.

Given under my hand, seal of office, this 13th day of November, 1844.

[L. S.] WM. STEELE, *Clerk.*

Exhibit B.

GEORGIA, *Baldwin county:*

To the honorable Thomas W. Cobb, judge of the superior court, for the county aforesaid, holding chancery jurisdiction.

Humbly complaining sheweth unto your honor your oratrix, Catharine Neeves, of the county aforesaid, who is the widow and relict of John Neeves, lately of said county, now deceased, that heretofore, to wit, in the year of our Lord one thousand eight hundred and ten, (1810,) in the county aforesaid, your oratrix was there a *feme sole*, being the widow and relict of Thomas Jewill, then deceased, your oratrix being then known, named, called, and styled Catharine Jewill; that, in the year aforesaid, while your oratrix was said Catharine Jewill, she was possessed of a very considerable real and personal estate, of the value of about five thousand dollars; that, in the year aforesaid, being a feme sole of full age, and capable of contracting marriage alliance, she concluded to marry, and did marry, or intermarry with, the aforesaid John Neeves, in the county aforesaid; that, previous to said intermarriage, your oratrix being desirous and having determined to secure to herself a sufficient and certain interest in the property she then held and owned, in the event that she should survive the said John Neeves after their then intended marriage, made, executed, and entered into a contract or certain articles of agreement in writing, signed and sealed by the said John Neeves and your oratrix respectively, bearing date on the seventeenth day of February, (17,) in the year one thousand eight hundred and ten, (1810,) a copy of which is hereto annexed, marked A, which your oratrix prays may be taken, held, and considered as a part of this her bill. In which said contract or agreement it is and was agreed, among other things, that all the property, both real and personal, which was then, or which might thereafter become, the right of the said John Neeves and your oratrix, should remain in common between them during their natural lives; and that in the event that the said Catharine, (your oratrix,) should become the longest liver (alias) the survivor, the whole of said property was to be and continue hers so long as she should live, and, at her death, said property to be divided between the heirs of her, the said Catharine, (your oratrix,) and the heirs of the said John Neeves, share and share alike, agreeable to the laws of distribution in such cases made and provided in this State.

Your oratrix further sheweth, that the said John Neeves has departed this life; that the principal part of the property owned and claimed by the said John and your oratrix, during the coverture aforesaid, was the property, or the proceeds of the property, of your oratrix while Catharine Jewill; that, by virtue of the contract or agreement so made and entered into as aforesaid, it is clear that your oratrix was to have and hold the whole of the real and personal estate during her natural life; that, upon her death, one-half of said property was to go to whomsoever

were her heirs at law at her death, supposing that she had departed this life as Catharine Jewill; that the other half of said property was to descend to the heirs at law of the said John Neeves, as though the marriage aforesaid had never taken place. That, in the year one thousand eight hundred and twenty-eight, in the month of October, in the county aforesaid, the said John Neeves made and executed his last will and testament, or a paper purporting to be such, and in said month and year, in said county, departed this life. That said will has been proven and recorded in the proper court, in the county aforesaid, a certified copy of which, marked B, accompanies this bill of complaint, which your oratrix prays may be taken as a part thereof. That, in and by said will, one-half of the estate aforesaid is devised and bequeat ed to one George W. Rowell, who is not, nor was not, any relative of the said John Neeves, (saving and excepting that part of said estate named in the codicil to said will, which is appropriated to the payment of the debts of the said John Neeves.) That, in and by said will and testament, Richard Rowell and Myles Green, both of the county of Baldwin, were appointed the executors of the said John Neeves. That the said Myles Greene has refused to qualify as such executor. That the said Richard Rowell has qualified as such executor, and has obtained letters testamentary as such, in the proper court in the county aforesaid.

Your oratrix further sheweth, that the debts of the said John Neeves are neither numerous nor large; the precise amount to your oratrix is unknown, but she believes not exceeding two thousand dollars. That the estate owned, claimed, and held by the said John Neeves and your oratrix was of large value, to wit, twenty thousand dollars, or some other large sum. That your oratrix is ready and willing to undertake and assume, and to actually pay, all the debts due by the said John at his death, and now here tenders her willingness and assumption to pay the same; and further, she is ready and willing, if required, to give ample and sufficient security so to do. Your oratrix does this to prevent the sale of any part of the estate aforesaid; believing that if the same, or any part thereof, is sold by said executor, that it may sell for far less than its fair value. Your oratrix also states, that a part of the property of said estate is now advertised for sale in the month of May next, by the executor aforesaid; to avoid which sale, or any other touching the property of said estate, your oratrix now here makes the tender aforesaid, believing that she can and will satisfy all the demands of the creditors of the said John Neeves, (and hereby agreeing and undertaking to do so, and to give security for the performance if required,) before the executor aforesaid can be compelled to pay said debts by the ordinary course of law. And your oratrix now here further agrees, and is ready and willing to undertake and agree, to indemnify the said executor against all and any of the creditors of the said John, that she will satisfy their several demands, and relieve and free him from all or any cost or damages that he may sustain in consequence of his not satisfying and discharging said debts, or any part thereof.

Your oratrix further sheweth unto your honor, that she verily be-

lieves that the said John was imposed upon and fraudulently practised upon by the said Richard Rowell, touching the making of said last will and testament. That the said Richard Rowell, the executor aforesaid, is no relation of your oratrix, nor the said John. That he is very unfriendly to your oratrix and her interest. That your oratrix charges, that she believes that the said Richard would rather injure and impair the interest of your oratrix, in and about said estate, than to improve and cultivate that interest. That, as a fit and proper person to manage said property, your oratrix charges that she has no faith in said Richard Rowell. That under and by virtue of the contract and agreement so made as aforesaid, between your oratrix, while Catharine Jewill and a feme sole, and the said John Neeves, in the year one thousand eight hundred and ten, and before the intermarriage aforesaid, your oratrix claims and charges that she is entitled, after paying the debts, to the whole of the estate, both real and personal, owned, claimed, and held by the said John at his death, for and during her natural life; and that, after her death, her heirs at law has a right to dispose of half of the same as their own right and property, and that the other half of said estate at her death becomes instantly the right and property of the heirs at law, as of eighteen hundred and ten, of the said John Neeves, (first having paid the debts or demands against the said John and your oratrix.) That the said John could not, according to the contract aforesaid, devise away any of his property in a manner different from that named in said contract. That, therefore, the said Richard can have no legal or equitable claim to said property, or any part thereof.

Your oratrix further sheweth, that the said Richard, she verily believes, is devising ways and means to obtain possession of the one-half of said estate; that she apprehends he will, if not restrained by the interposition of this honorable court, obtain possession of some part of said property. That she fears and apprehends that she will be harrassed and vexed with law suits by the said Richard, he having, as executor, legal authority to sue, (but none in equity,) for said property, or some part thereof, unless restrained from so doing. That she is informed, and does verily believe, that such is his intention. That your oratrix has the said estate now in possession, or nearly all thereof; that much of said estate is in negro property living near the residence of the said Richard. That your oratrix fears and believes that the said Richard has already taken possession of some of the negroes, and will again, unless lawfully prohibited, take possession of said negroes, or some part thereof, the first opportunity that may present. That she does fear and verily believes, that if the said executor could by any means induce said negroes, or a part thereof, to leave the possession of your oratrix, and go into the possession of him, the said executor, that he would readily do so; and that he would not wait the trial of a claim to the same by any regular process of a court of competent authority to decide on the same. That, unless the said executor be restrained as aforesaid, your oratrix does verily believe that he will by some means defeat in part, (if not the whole,) the true intent and meaning of the contract aforesaid, by de-

priving your oratrix, by some improper means, of her right to said property, or a part thereof, which right she claims as aforesaid.

Your oratrix further sheweth, that said Richard as executor has now advertised for sale the land and mills mentioned in the codicil to said will That, in consequence of the tender of your oratrix as aforesaid, there is no necessity, nor is there any compulsion, on the part of the said executor, to sell any of said lands. That said sale is advertised for May next. That, unless said Richard is prohibited from selling said property, your oratrix believes that he will sell the same, which she believes will be to her damage. But now, so it is, may it please your honor, that your oratrix had well hoped that she would be permitted to remain in quiet and peaceable enjoyment of said estate, after paying the debts of the said John Neeves, and that said Richard would not interfere with her rights under said contract so made as aforesaid, but the contrary your oratrix charges to be true; and that he will not permit your oratrix so to remain in quiet and peaceable possession of the same unless enjoined from so doing.

In tender consideration whereof, and for as much as your oratrix is remediless in the premises, at and by the direct and strait rules of the common law, and relievable only in a court of equity, where matters of this and a like kind are properly cognizable and relievable. To the end, therefore, that the said Richard Rowell may full, true, direct, and perfect answers make upon his corporal oath, according to the best of his knowledge, information, and belief, to all and singular the matters and things heretofore stated and charged, as fully in every respect as if the same were hereinafter again repeated, and he thereto particularly and specially interrogated; and more especially whether said copy exhibit, marked A, is not a true copy of a genuine and original instrument made for the purpose therein expressed; whether he ever heard said John Neeves say any thing about said contract; whether or not he did not persuade said Neeves to make a will, or advise him so to do; whether or not he is not devising ways and means to obtain possession of said estate, or some part thereof; and whether he will not continue to do so unless prohibited by this court. May it please your honor to grant unto your oratrix the State's writ of injunction, to be directed to the said Richard Rowell, thereby, under a certain penalty to be named in said writ, commanding and enjoining him from selling any of said estate, or from interrupting the quiet and peaceable possession which your oratrix now has to said property; and that he in no wise, manner, or form, either directly or indirectly, by agent, attorney, or in person, interfere with, or interrupt, or take possession of, any of said property belonging to said estate, or named in said will, until the further order of your honor in the premises. And that after there has been a full and fair hearing of this cause, that your honor will decree the whole of said estate to your oratrix during her natural life, she paying the just demands against said John Neeves; and that said Richard Rowell may be enjoined perpetually from touching, troubling, or interrupting said property, and the possession thereof, by any means or device whatever; and that your

oratrix may have such other and further relief in the premises as the nature of the case shall require, and as to your honor shall seem meet.

May it please your honor to grant unto your oratrix the State's writ of subpœna to be directed to the said Richard Rowell, thereby commanding him, at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your honor at the superior court to be held in and for the county aforesaid, then and there to answer fully all and singular the premises aforesaid, and to stand to, perform, and abide such order, direction, and decree therein as to your honor shall seem agreeable to equity and good conscience, all things considered; and your oratrix will ever pray, &c.

SEABORN JONES, and
WILLIAM H. TORRANCE, and
S. ROCKWELL,
Solicitors for complainants.

April, 1829.

Exhibit A.

GEORGIA, *Baldwin county:*

Articles of agreement made and entered into this seventeenth (17) day of February, in the year one thousand eight hundred and ten, (1810) between John Neeves and Catharine Jewill, widow and relict of the late Thomas Jewill, (deceased,) all of the State and county aforesaid, are as follows, (viz.,) whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewill, widow as aforesaid, are as follows, to wit, that all the property, both real and personal, which is now or may hereafter become the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of the said Catharine and the heirs of the said John, share and share alike, agreeable to the distributive laws of this State made and provided; and, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above.

In witness whereof, the said John and Catharine hath hereunto set their hands and affixed their seals the day and year above written.

JOHN NEVES, [L. S.]
her
CATHARINE ⋊ JEWILL. [L. S.]
mark

Test: CORNELIUS MURPHY,
JESSE WARD.

Exhibit B.

In the name of God, amen. I, John Neves, of the county of Baldwin and State of Georgia, being weak in body under affliction, but of sound disposing mind, memory, and understanding, do make and or-

dain this my last will and testament, hereby revoking all or any former will or wills by me heretofore made, that is to say: first, I commend my soul to God who gave it, and my body to the earth, to be decently buried at the discretion of my executors hereafter to be named; and as to worldly estate, with which it hath pleased God to bless me, I herein will and bequeath in the following manner, to wit, that immediately after my decease, and proof of this my last will and testament, that the court of ordinary shall appoint a proper number of fit persons, who shall be the commissioners to divide my whole estate, both real and personal, equally between my wife, Catharine Neves, and my heirs hereafter to be named; that is, that she, my said wife Catharine Neves, shall have one half of my whole estate, both real and personal, as aforesaid, for her own proper use, to her and her heirs forever; and that the other or remaining half of my whole property or estate I dispose of and bequeath in the following manner, that is to say, that the whole of my half of my said estate, both real and personal, as aforesaid, I give and bequeath to George W. Rowell, son of Captain Richard Rowell, of this county, of Baldwin aforesaid, to him and his heirs forever; further, my will is, that I have nor do I claim any part of the property that was given to my said wife by her sister, Mrs. Pine; with this proviso that my said heir, George W. Rowell, shall not be subject to pay a note that I gave to Susan Dickson for about eight hundred dollars, to be paid when called for out of the said estate of Mrs. Pine, or my other obligations relating to the said estate of Mrs. Pine. Lastly, I nominate and appoint my two friends, Captain Richard Rowell and Myles Greene, executors, to carry into effect the true intent and meaning of this my last will and testament. In witness whereof, I have hereunto set my hand and seal, this eighth day of October, in the year of our Lord one thousand eight hundred and twenty-eight.

JOHN NEVES. [L. S.]

Assigned and acknowledged in presence of us—
ROBT. G. CRITTENDEN,
ANDERSON REDDING, his ✕ mark.
JACOB WOODALL, his ✕ mark.

This following, I will shall be appended to and a codicil to the foregoing part of my last will and testament, viz., that my land and mills on Black creek, in Wilkinson county, together with a negro man, carpenter, named Jay, belonging to me, shall be sold at the discretion of my executors, to pay all my just debts.

In witness whereof, I have hereunto set my hand and seal this 8th day of October, 1828.

JOHN NEVES. [L. S.]

Assigned and acknowledged in presence of us—
RO. G. CRITTENDEN,
ANDERSON REDDING, his ✕ mark.
JACOB WOODALL, his ✕ mark.

GEORGIA, *Baldwin county:*

Court of ordinary, November term, 1828.

Personally appeared in open court Anderson Redding and Jacob Woodall, two of the subscribing witnesses to the within will, who, after being duly sworn, say, that they saw John Neves, the within named testator, sign, seal, and publish the within as his last will and testament; that he was of sound mind and memory, and that he did it freely, without compulsion, so far as they know; and these deponents further say, that they saw Robert G. Crittenden subscribe his name as a witness thereto, and that these deponents saw each other subscribe the same.

his
ANDERSON ✕ REDDING,
mark

his
JACOB ✕ WOODWALL.
mark

Sworn to in open court this 4th day of November, 1828.
R. A. GREENE, *Clk. C. O.*

GEORGIA, *Baldwin county:*

CLERK'S OFFICE, COURT OF ORDINARY,
Milledgeville, 4th April, 1829.

I do hereby certify, that the above and foregoing *that* contains a true copy of the last will and testament of John Neves, as recorded in this office. Given under my hand and private seal, (there being no seal of office,) this the day and year last above written.
R. A. GREENE, *C. C. O.* [L. S.]

GEORGIA, *Baldwin county:*

Personally appeared Catharine Neves, the complainant in the foregoing bill of complaint, who being duly sworn saith, that the facts stated in the foregoing bill are true, so far as they come to her own knowledge; and that as far as they depend upon the knowledge and information of others, she believes them to be true.

her
CATHARINE ✕ NEVES.
mark.

Sworn to and subscribed before me, this 13th day of April, 1829.
B. P. STUBBS, *J. P.*

At chambers, 14th April, 1829.

Read and sanctioned. Let the State's writ of subpœna issue in the usual penalty. Also, let the writ of injunction issue as prayed for in the bill, upon the following conditions, to which the attention of the clerk of Baldwin superior court is particularly invited. 1. That the complainant shall, before the issue of the injunction, give bond and two sufficient securities, payable to the defendant, as executor of the last will

1225

and testament of John Neves, deceased, in the penalty of four thousand dollars, conditioned that the debts due by John Neves' estate, presented to the executor of John Neves for payment, shall be paid and discharged within twelve months from the probate of his last will and testament, with all costs and charges, by her out of the assets of John Neves in her hands to be retained; and that the executors aforesaid shall be indemnified for all costs, charges, and claims against him, on account of any such debts of the estate of John Neves, deceased; and further, that the complainant shall give bond, with two sufficient securities, in the penalty of sixteen thousand dollars, payable to the defendant, as executor of John Neves, deceased, conditioned that the complainant shall permit, (if it has not already been done,) the defendant, as executor, to take a full and perfect inventory and appraisement of the personal estate and effects, of debts due to the estate of John Neves, deceased, according to law; and that the estate, so inventoried and appraised, and left in the hands of the complainant, with the increase and products thereof, (except such as may be lost by death, or consumed by time or accident, or be applied in the payment of the debts of the estate of John Neves, deceased, of all which a fair and just account shall be kept,) shall be ready and forthcoming at the final hearing of this bill, in case the same shall be required by the decree or order of this court in the premises, and ready to be delivered up in obedience to such decree or order, or to the executor of John Neves, deceased, on the final hearing of this bill, in case the decree shall be in favor of the defendant; both of which bonds shall be deposited in the clerk's office, there to be kept subject to the order of the court; and let such other and further proceedings be had as are usual in cases in equity.

In case both the bonds above named shall not be given, no injunction is to be issued, but the case may proceed with the usual subpœna.

THOS. W. COBB,
Judge sup. courts Ock. dist.

GEORGIA, *Baldwin county:*

To Richard Rowell.

For certain causes offered before us in chancery, we command and strictly enjoin you, that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before us in equity, at a superior court to be held in and for the county of Baldwin, on the third Monday in August next, then and there to answer concerning those things which shall be then and there alleged to you in the bill of complaint of Catherine Neves, and to do further and receive whatever our said court shall have considered in this behalf; and this you will in nowise omit, under the penalty of ten thousand dollars.

Witness the honorable Thomas W. Cobb, judge of the superior courts of the Ocmulgee circuit, this 4th day of May, 1829.

WILLIAM J. DAVIS, *Clk.*

GEORGIA, *Baldwin county;*

To Richard Rowell, his agents and attorneys.

Whereas it has been represented to me by Catharine Neves, verified by affidavit, that she claims title to all the estate, both real and personal, of John Neves, deceased, of whose will you are executor, by virtue of a marriage contract entered into by her and the said John Neves, on the eve of, and in anticipation of said marriage, which was accordingly consummated; and she having filed her bill in chancery, returnable to the August term, eighteen hundred and twenty-nine, of Baldwin superior court, stating the above facts, and that she is apprehensive you will molest her in the use, possession, and enjoyment of said property, or some part thereof, unless restrained from doing so.

You are, therefore, hereby commanded and strictly enjoined, under the penalty of ten thousand dollars, from taking possession of any of said property, or from any wise or in any manner interfering with the same, or any part thereof, or with the possession of the same, or any part thereof, and from molesting her, either directly or indirectly, in the enjoyment and possession of the same, or any part thereof, (except to take an inventory and appraisement of the personal property of the said John Neves, together with his * * * all of which are to be left in possession of the said Catharine Neves,) either by yourself individually, or as executor of John Neves, deceased, or by your agents or attorneys, or any other person for you, until the further order of the said court.

Witness the honorable Thomas W. Cobb, judge of the superior courts of the Ocmulgee circuit, of the State aforesaid, this 4th day of May, 1829.

WILLIAM J. DAVIS, *Cl'k.*

The defendant personally served with a copy this 8th day of May, 1829.

S. BIVINS, *Sh'ff.*

In Baldwin superior court, bill in equity, and for injunction.

CATHARINE NEVES, complainant,
vs.
RICHARD ROWELL.

The answer of the defendant, Richard Rowell, to said bill.

The defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer unto, answereth and saith, that he does not know, but that he has heard and believes, that the complainant was the widow, in 1810, of Thomas Jewill, then deceased, as dated in said bill; that she married John Neves, as stated in said bill, and that before her marriage with the said John Neves she enter-

ed into such a contract with the said John as is exhibited in the copy thereof annexed to said bill. This defendant does not know, or believe, that the principal part of the property owned and claimed by the said John Neves and Catharine Neves during their coverture, was the property, or the proceeds of the property, owned by the complainant while Catharine Jewill. He admits that the said John Neves made his will, as stated in said bill, and that the copy thereof annexed to said bill is a true copy; and that a codicil was attached to said bill as stated in the bill, and that the said John Neves departed this life at or about the time stated in said bill. He admits that the said George W. Rowell, in said bill mentioned, was not related to the said John Neves; that this defendant and Miles Green were appointed executors to said will, and that this defendant alone has qualified as such executor. He believes that the debts of the estate of the said John Neves amount to at least four thousand dollars, and that they probably amount to five thousand dollars. He admits that the complainant may entertain the fears expressed in said bill; but he avers that it is not now, and that it never has been, the intention of this defendant to use any improper means in getting possession of any part of the estate of the said John Neves, and that [it] is not now, and that it never has been, his intention to violate what he believes to be the rights of the complainant. The estate left by the said John Neves, he believes to be probably worth from twenty to thirty-five thousand dollars. This defendant denies that he in any manner imposed upon the said John Neves, or used any fraudulent practice whatever towards him touching the making of said will; and he admits that he is not related to the said John Neves, or to the complainant. He admits that the complainant is in possession of all of the estate of the said John Neves, and that estate consists of negroes as well as other property, as stated in said bill. He admits that as executor to the will of the said John Neves he has advertised for sale the lands of the said John Neves, directed to be sold in the codicil to his will.

This defendant admits that the complainant, at and before the time of her intermarriage with the said John Neves, was possessed of a considerable estate, but the value of which this defendant has not the means of ascertaining, but he denies that more than half, if so much, of the property so possessed by the complainant at the time of said marriage, belonged to the complainant, as he is informed and believes; that at least one half of said property belonged to the next of kin of Thomas Jewill, deceased, the former husband of the complainant; and from the best information which this defendant can obtain, he believes, and so charges, that the said complainant practised a fraud on the said John Neves, in procuring his agreement to the ante-nuptial contract set forth in said bill; that to procure the consent of the said John Neves to the said contract, she induced him to believe that her estate was at least twice as large as it was in reality, and she concealed from him, as this defendant believes, the material fact, that the half at least of the estate of which she was then possessed, of right belonged to the next of kin of Thomas Jewill, the former husband of the complainant. The com-

plainant states in her bill, that the estate of which she was possessed while feme sole, in the year eighteen hundred and ten, and when about to marry the said John Neves, was worth about five thousand dollars. A bill in equity was instituted in said superior court, returnable to the September term thereof, in the year eighteen hundred and eleven, by the heirs and legatees of the said Thomas Jewill against the said complainant and the said John Neves, then in life, as the husband of the complainant, on account of his liability for demands against her, and for the purpose of recovering from the complainant and the said John Neves the distributives' shares to which the said heirs and legatees of Thomas Jewill were entitled out of the estate of the said Thomas Jewill. In the said bill the present complainant was sued as administratrix of the said Thomas Jewill, and the said John Neves was sued as administrator in the right of his said wife; and this defendant is informed and believes, that a large proportion of the property aforesaid, possessed by the complainant at the time of her intermarriage with the said John Neves, of right belonged to the said heirs and legatees of Thomas Jewill. The said bill, after a long continued litigation, was finally decided in the year eighteen hundred and sixteen, by a verdict and decree against the said John Neves and Catharine Neves, for the sum of three thousand five hundred and four dollars and sixty-two cents, besides costs. The expense of defending said suit this defendant believes to have been considerable; the said John Neves thus lost on account of demands existing against the complainant at and before the time of her intermarriage with him, nearly as large an amount as she obtained by his marriage with her, whereby the reciprocity and consideration of said ante-nuptial contract were greatly impaired. And this defendant believes, that the said John Neves would not have entered into said contract, had he been informed of the claims of the heirs and legatees of Thomas Jewill against the said Catharine. The defendant further answers that the said ante-nuptial contract, as he is informed and believes, was either waived and abandoned for a long course of years, or that during that time it was kept secret for fraudulent purposes; wherefore the defendant maintains that it ought to be set aside.

The defendant denies all unlawful combination, and having answered said bill, prays to be hence dismissed with his reasonable costs.

DAVID B. MITCHELL,
CHARLES P. GORDON,
MARK A. COOPER, and
CUTHBERT & POLHILL,
Solicitors for defendant.

GEORGIA, *Baldwin county:*

Before me personally appeared Richard Rowell, who being duly sworn deposeth and saith, that the statements contained in the foregoing answer, so far as they concern his own act and deed, are true of his own knowledge; and so far as they concern the act or deed of any other person, he believes them to be true.

RICH'D ROWELL.

Sworn to and subscribed before me, this 26th day of August, 1831.
WM. D. SCOGIN, *J. P.*

Replication considered as filed, and copy waived.
CUTHBERT & POLHILL.

CATHARINE NEEVES
vs.
RICHARD ROWELL, ex'r, &c.

In Baldwin sup'r court.—Bill in equity.—Amendment to answer.

This defendant, now and at all times, (as heretofore,) saving and reserving to himself all and all manner of advantage and benefit of exception that may be had, taken, &c., to the imperfections, untruths, &c., in complainant's said bill of complaint contained, for amended answer by leave of the court thereunto saith, that he was regularly and duly appointed executor of the last will and testament of the said John Neves, deceased; that said will was duly established at law, after having been caveated and contested by the said Catherine; that the said John Neves, at the time of his death, was owing various large debts to the amount of four thousand dollars, or other large sum, some of which debts were created in the purchase of and for consideration of some of the property which complainant claims in her said bill; and this defendant avers, that the said John had a right to make his will and appoint an executor, and to order and direct, and make provision for, the payments of said debts; and this defendant saith, that before he had had time to fulfil the duties of executor, even in the payment of the debts aforesaid of the said John, the said Catharine commenced suit against this defendant as executor as aforesaid, by and in consequence of which this defendant hath been compelled to incur, and expend large sums of money, and contract debts by way of defraying the expenses thereof, to the amount of six hundred dollars, or other large sum, and was compelled by the said Catharine's contracts, and contesting the will of the said John, this defendant has been compelled to expend the sum of one thousand dollars, or other large sum for expenses in fees, &c., in defending the same, all which this defendant thinks reasonable and just, should be re-imbursed or refunded to him, together with all other expenses and expenditures disbursed by this defendant, in due course of administration, &c.

CHARLES P. GORDON,
Sol. pro def't.

GEORGIA, *Baldwin county:*

Personally appeared before me Richard Rowell, and being duly sworn saith, that what is contained in the foregoing amended answer, as relating to his own act and deed is true; and what is stated as relating to the act and deed of any other person or persons, he believes to be true.

Sworn to and subscribed in open court this 1st Nov., 1832.
RICHARD ROWELL,
WILLIAM J. DAVIS, *Clerk.*

I acknowledge service of this amended answer, this 1st Nov., 1832.

GEORGIA, *Baldwin county:*

To the honorable Jno. G. Polhill, judge of the superior courts of said county, holding jurisdiction in chancery.

Humbly complaining, sheweth to your honor your orator, Richard Rowell, that Catharine Neves, now Catharine Scott, of said county, instituted a case by bill in equity against your orator, as executor of John Neves, deceased, and former husband of the said Catharine, returnable to August term of said court, in the year eighteen hundred and twenty-nine; and in her said bill the said Catharine sought to set up, and have enforced, an ante-nuptial contract between herself and the said John Neves, bearing date on the seventeenth day of February, in the year eighteen hundred and ten, by which she claimed an unqualified estate in one half, of the property left by the said John Neves, and a life estate in the other half; thereby attempting to render inoperative the will of the said John Neves, and to have the whole of the said estate of John Neves, after the payment of his debts, decreed to her; and by her said bill she procured an injunction against your orator, whereby he has been restrained from executing the will of the said John Neves.

Your orator believing it to be just, that if the claims of the said Catharine should be sustained, he should be allowed all reasonable expenses incurred by him in his character as executor aforesaid, but on the trial of said case, the court refused to permit him to exhibit his charges against said estate, on the ground that they had not been passed by the court of ordinary having jurisdiction; and in consequence they were not allowed by the jury. A verdict was rendered with which your orator was dissatisfied, and which, and from which, he entered an appeal, and the case is still pending. Under the decision made by the court, as above stated, your orator presented his accounts, as executor, against the estate of John Neves, to the court of ordinary of the county of Baldwin. They were rejected by that tribunal, and he appealed from its decision to the superior court of said county; which case is likewise there pending, a verdict having been rendered, and a rule nisi for new trial having been granted thereon. The former case stands on the docket for trial before latter; your orator is advised and believes, that it is the intention of the counsel for the said Catharine to endeavor to obtain a trial on the former before the latter, and if a decree thereon should be rendered in favor of the said Catharine, to make use of said decree as a plea in bar, or as conclusive evidence against your orator's accounts in the case on appeal from the court of ordinary; and thereby to exclude your orator's just demands against the estate of John Neves, without a trial on their merits.

Which actings and doings of the said Catharine and her counsel are manifestly contrary to equity and good conscience. And for as much as your orator is remediless in the premises without suitable aid from a court of equity, he prays the interposition of this court in his behalf.

That the said Catharine and her confederates upon their corporal oaths may file true, direct, and perfect answers to all and singular the matters set forth herein.

And that the said Catharine, and her husband, William F. Scott, when he shall be made a party to the bill of the said Catharine, their representatives, attorneys, and counsellors, may be restrained from proceeding to trial on the said bill before a trial shall be had on the case aforesaid brought up by appeal from the court of ordinary, or to take any step whereby the accounts of your orator before mentioned may be excluded, without a trial on their merits; and for other and further relief.

May it please your honor to grant to your orator the State's most gracious writ of subpœna, to be directed to the said Catharine and the said William F., requiring them to be and appear at the next term of the superior court, to be held in and for said county, then and there to answer the premises, and to stand to and abide by such order and decree therein as to said court shall seem reasonable and just.

And may it further please your honor to grant to your orator the State's writ of injunction, prohibiting them, and all other persons acting with or for them, from proceeding to trial on the bill aforesaid, before a trial shall have been had on the case brought up as aforesaid by appeal from the court of ordinary. And your orator will ever pray, &c.

JOHN A. CUTHBERT,
Solicitor pro complainant.

GEORGIA, *Baldwin county:*

Before me personally appeared Richard Rowell, complainant aforesaid, who being duly sworn, deposeth and saith, that the statements contained in the forgoing bill, so far as they concern his own act and deed, are true of his own knowledge; and so far as they concern the act and deed of any other person, he believes them to be true.

RICHARD ROWELL.

Sworn to and subscribed before me, this 11th day of June, 1835.

JOHN G. POLHILL,
Judge S. C. O. C.

GEORGIA, *Baldwin county:*

CLERK'S OFFICE, *Superior court.*

This is to certify, that Richard Rowell paid all costs which has accrued, and filed his bond of indemnity in terms of the law.

Given under my hand this 11th day of June, 1835.

R. H. SMITH, *Clerk.*

CHAMBERS, *June 12th*, 1835.

Read and sanctioned.

Let the State's writ of subpœna and injunction issue each in the sum of one thousand dollars, and such other proceedings be had as are usual in chancery.

ANGUS McDONALD KING,
Judge superior court.

Service acknowledged, June 12th, 1835.

S. ROCKWELL,
Solicitor pro defendant.

The answer of William F. Scott and Catharine Scott, his wife, to the bill of complaint of Richard Rowell.

The defendants, now and at all times hereafter, saving and reserving to themselves all and all manner of benefit and advantage of exception that may be had or taken to the many errors, uncertainties, and manifest insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or unto so much thereof as these defendants are advised is material or necessary for them to make answer unto, answer and say: That they admit that by said bill the said Catharine did seek to establish an ante-nuptial contract between herself and the said John Neves, which she had the right to do in law and equity, and which has been so pronounced by a judge and on the trial of said cause. They admit that the contract is dated as charged. They deny that she claimed an unqualified estate in the one-half of the property left by the said John Neves. The defendant, Catharine, states, that she sought to establish and carry into execution the said contract according to its plain sense and meaning. That she did not, as she is informed by the counsel who managed said cause for her, and so she believes, contend for any thing further on the trial of said cause than to prevent the complainant from interfering with said property during her natural life, as by the contract she was so entitled, leaving further proceeding in said contract to be determined by the proper tribunals after her death. The defendant, William F. Scott, knows not *that* the said Catharine contended for in said bill, other than from information, and that is, what the said Catharine has here answered. The defendants admit and believe, that the said Catharine by said bill did claim the whole of said property during her natural life, and that by said bill nothing was intended or could be adjudicated, for as to how said property was to go after the death of said Catharine was not the matter in issue; but they do say, that said John Neves under said contract had no right or authority to dispose of any of said estate by his will. They admit that an injunction was obtained as stated, but before which was done, the said Catharine had given undoubted security in the sum of twenty thousand dollars, and assumed the payment of all the debts of said John Neves, which she done, and has paid them. The defendants deny that the complainant is entitled to be allowed any expense incurred by him as the executor of said John Neves, other than the ordinary expenses of the court of ordinary in such cases, which they are informed and believe, that the counsel for said Catharine have heretofore agreed and was, and the defendants are now willing, to allow also some other small items amounting in the whole to something like one hundred and fourteen or fifteen dollars, as they are informed and believe; but that the said complainant was not satisfied with, but claimed to be allowed him, seventeen hundred dollars or thereabouts, for attorneys' and counsels' fees against said estate, which these defendants say that he is not entitled to at law or equity, as they are informed and believe.

These defendants, so far as they know, or are informed and believe, deny expressly, that on the trial of the bill of said Catharine against

the complainant, that he was refused the right to exhibit his charges against the estate of said John Neves, upon the ground that they had been passed by the court of ordinary, and in consequence of which they were not allowed him by the jury. These defendants state, for so they are informed and believe, that they were rejected upon two grounds: *first*, that *is* was not the proper time and place to present them; and *secondly*, because they were illegal, improper, and unjust, and ought not to be allowed, and so the jury found; and they now state that they never ought to be allowed. They admit *that* was a verdict as stated, from which this complainant, then defendant, appealed, which appeal is still pending. They admit that the complainant did afterwards, (viz.,) the trial aforesaid, present his account to the court of ordinary for this county, but they deny that *is* was under such a decision as stated, which accounts by said court of ordinary were then and there rejected as being improper and unjust; and these defendants annex hereto a certified copy of said court of ordinary rejecting said accounts, which they pray may be taken as a part of this their answer.

They admit that said complainant did enter an appeal from said order and judgment of said court of ordinary, which appeal is now pending in this court. But the defendants state expressly that there has been an appeal trial of said case in this court, when a special jury found a verdict for complainant for the sum of one hundred and dollars and cents, which the said Catharine was then ready and willing to pay, and the defendants are now ready and willing, but no more, and that willingness proceeds alone from the ground of their wish to buy their peace and have the suit ended; for they do say that in good faith complainant is not entitled to a cent, as they charge and so believe; that through his unfair practices and improper importunities, he procured the making of the will of said John Neves. They admit that complainant did obtain an order for a new trial in the case on his accounts, which leaves the case open now for trial again, but they deny that *is* was upon the ground that the jury should have allowed the counsel and attorney's fees, contended for by complainants. That question has already been twice determined against complainant; once by the court of ordinary, and once by a special jury in this court.

They admit that the case of the said Catharine against complainant stands first on the docket of the two cases aforesaid. They know not what their counsel intend to do in the case, other than they expect and believe that their counsel will do and perform every act and thing necessary for the speedy termination of the bill of said Catharine against complainant consistent with the duty of counsel. These defendants have given their counsel no special instructions in the matter, but expect and believe that they will do justice to defendants, and no more.

And the defendants having fully answered the said bill, pray to be hence dismissed, with their reasonable costs in this behalf most unjustly sustained.

WILLIAM H. TORRANCE,
S. ROCKWELL,
Solicitors pro defendants.

GEORGIA, *Baldwin county:*

Personally appeared before me William F. Scott and Catharine Scott, who being duly sworn say, that the facts set forth in the foregoing bill are true, so far as they depend upon their own knowledge; and so far as they are derived from the information of others, they believe them to be true.

W. F. SCOTT,
her
CATHARINE ⋈ SCOTT,
mark.

Sworn to before me, this first day of July, 1835.

B. P. STUBBS, *J. P.*

GEORGIA, *Baldwin county:*

Court of ordinary, July 15, 1833.

The court met pursuant to adjournment. Present, their honors Thomas H. Kenan, John A. Cuthbert, William Gregg, and William F. Scott, justices.

Richard Rowell, executor of the last will of John Neves, deceased, having presented to the court his account against said estate, it is ordered that said account be rejected as unreasonable and unjust.

GEORGIA, *Baldwin county:*

Office of the inferior court, when sitting as a court of ordinary, June 29th, 1835.

I, B. P. Stubbs, clerk of the court of ordinary for the county aforesaid, do certify, that the above and foregoing is a true extract from the minutes of said court.

In witness whereof, I have hereunto set my hand, and affixed the seal of office.
[L. S.]

B. P. STUBBS, *Clk. C. O. B. C.*

GEORGIA, *Baldwin county:*

Personally appeared William F. Scott and Catharine Scott, the defendants named as aforesaid, who, being duly sworn, say, that the facts stated in the foregoing answer are true, so far as they depend upon their own knowledge; and that so far as they depend upon the knowledge and information of others, they believe them to be true.

WM. F. SCOTT,
her
CATHARINE ⋈ SCOTT.
mark.

Subscribed and sworn to this day of June, 1835.
Filed in office, 2d July, 1835.

R. H. SMITH, *Clerk.*

1230

Baldwin Superior court, August term, 1831.

CATHARINE NEVES, vs. RICHARD ROWELL. } Bill and demurrer.

The court having heard argument and considered this case, finds nothing to delay the complainant of that aid and equitable relief to which her case is entitled. It is therefore ordered that the demurrer be disallowed, and the defendant answer to the bill.

November term, 1832.—Special jury.

1 Charles I. Paine, 2 John Marler, 3 Moses Bryington, 4 James McCrary, 5 Samuel Grantland, 6 Baradel P. Stubbs, 7 Anthony Newsom, 8 Royal Lockett, 9 John R. Scott, 10 William W. Pool, 11 James Bonner, 12 Thomas B. Stubbs.

CATHARINE NEVES, compl't, vs. RICHARD ROWELL. } Verdict.

We, the jury, find for the complainant during her life, with costs of suit:

C. J. PAINE, *Foreman.*

CATHARINE NEVES, vs. RICHARD ROWELL.

Bill in equity, and verdict for the complainant for cost of suit.

The defendants being dissatisfied with the verdict of the jury rendered in the above case, and having paid all costs, and demanded an appeal, and brings John A. Cuthbert and him as his security, and they, the said Richard Rowell and John A. Cuthbert, acknowledge themselves jointly and severally bound to Catharine Neves, the complainant, for the payment of the eventual condemnation money in said cause.

In testimony whereof they have hereunto set their hands and seals this 8th day of November, 1832.

RICHARD ROWELL, [L. S.]
By his attorney, John A. Cuthbert.
JOHN A. CUTHBERT. [L. S.]

August term, 1833.

CATHARINE NEVES, vs. RICHARD ROWELL.

In Baldwin superior court. Rule to dismiss appeal from the court of ordinary.

The motion of Catharine Neves to dismiss the appeal of Richard Rowell, executor of John Neves, on his accounts presented to and rejected by the court of ordinary, having been heard, it is ordered that said motion be overruled, and the appeal sustained.

January term, 1834.—Special jury.

1 Walter Jones, 2 John Marler, 3 Elijah King, 4 Anthony Newsom, 5 Samuel Tucker, 6 Thomas L. Densler, 7 William Grigg, 8 Jacob Gurn, 9 John R. Scott, 10 Samuel B. Foster, 11 Jno. W. L. Daniel, 12 Benjamin Askew.

RICHARD ROWELL, ex'r,
vs.
The estate of JOHN NEVES.

Appeal from the court of ordinary.—Verdict.

We, the jury, find for the plaintiff one hundred and fourteen dollars and sixty-four cents, with the cost of this suit.

WM. GRIGG, *Foreman.*

Accounts of Richard Rowell, executor of John Neves.

Appeal from the court of ordinary, rule ni. si. for a new trial.

On motion of counsel for Richard Rowell, it is ordered that Catharine Neves, the party opposing the establishment of said accounts, shew cause, on the first day of the next term, or so soon thereafter as counsel can be heard why the verdict of the jury in the said case should not be set aside, and a new trial granted on the following grounds, viz:

1st. That in rejecting the accounts of the executor for fees paid to counsel employed in sustaining the will, and passing it to record against the caveat of Catharine Neves, the finding of the jury was contrary to the evidence and the law.

2nd. That in rejecting the accounts of the executor for fees paid to counsel employed, to enable him to execute the provisions of the will, in opposition to the bill in equity of Catharine Neves, the finding of the jury was contrary to the evidence and the law.

July term, 1835.

RICHARD ROWELL, as executor of John Neves,
vs.
The estate of JOHN NEVES, dec'd.

Application to establish an account against the estate of John Neves, deceased, and verdict for the applicant.

In this case a motion is made for a new trial by the applicant, Rowell, upon the following grounds: first, for that the verdict is contrary to evidence and law; the second ground is in substance the same; in looking over the substance of the evidence agreed upon by the counsel on both sides, the court has looked into the testimony to see if there be any to sustain the verdict rendered by the jury; and the court is of opinion that there is no evidence on the part of the person claiming an interest in the estate to sustain the jury in that portion of their verdict rejecting the charge for counsel fees; the evidence given by the witnesses goes to shew, that these charges for counsel fees were reasonable, and for and on account of the litigation for the estate. The only evidence which would in any wise sustain the jury in lessening the account is

the evidence of one of the witnesses, that he thought more counsel had been engaged by the executor than were necessary, and upon this evidence alone the court is of opinion the jury were not sustained by the evidence in rejecting the account for counsel fees. Therefore, the verdict in this case is set aside, and a new trial ordered upon the grounds stated above.

JOHN SHLY, *Judge*.

Special jury.

1. John R. Smith,
2. George G. Holcombe,
3. Emmer Bails,
4. Joseph Stovall,
5. Adoniram Treadwell,
6. William A. Teunille,
7. William McGinty,
8. Walter Jones,
9. Isaac Newell,
10. Aaron Searcy,
11. Thomas Turk,
12. George Lewes.

RICHARD ROWELL, ex'r, &c., vs. The estate of JOHN NEVES, dec'd.

Appeal from the court of ordinary, new trial.

We, the jury, find for the plaintiff eight hundred and ninety-five dollars and fifty four cents, with cost of suit.

WM. A. TEUNILLE, *Foreman*.

CATHARINE NEVES vs. RICHARD ROWELL.

Bill in equity and for injunction.

We, the jury, find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death; and we further find that the complainant do pay to defendant the sum of nine hundred and two $\frac{75}{100}$ dollars, which have been allowed by the special jury at this time, upon an appeal from the court of ordinary, as expenses and cost incurred by the defendant in proving the will of John Neves, deceased, and resisting the marriage contract between John Neves and Catharine Neves, his wife; and we further find for the complainant the cost of suit.

S. BOYKIN, *Foreman*.

Special jury.

1. Samuel Boykin,
2. George G. Holcombe,
3. Joseph Stovall,
4. Allen Little,
5. Adoniram Treadwell,
6. Archibald C. McIntyre,
7. William Grigg,
8. Richard M. Orme,
9. Pleasant R. Hightower,
10. William McGinty,
11. Wm. J. W. Willborn,
12. George Lewes.

CATHARINE NEVES
vs.
RICHARD ROWELL, ex'r. } In equity.

Whereas, since the commencement of said bill, the complainant has intermarried with William F. Scott, it is on motion ordered, that said cause proceed in the name of William F. Scott and his wife Catharine Scott.

GEORGIA, *Baldwin county:*

Clerk's office, superior court.

I, William Steele, clerk of the superior court for the county and State aforesaid, do certify, that the foregoing and annexed pages contain true copies of the original bill and answer, Catharine Neves vs. Richard Rowell. The original cross bill and answer, Richard Rowell vs. William F. Scott and Catharine Scott, his wife, and the entries on the minutes of said court touching said cases.

Given under my hand and seal of office, this 23d day of February, 1845.

Filed February 3d, 1845.

G. GLEN, *Clerk.*

WILLIAM NEVES, complainant, and
JAMES C. NEVES, complainant,
and
RICHARD F. SCOTT and RICHARD ROWELL, defendants. } In equity.

In the sixth circuit court of the United States for the district of Georgia:

The several demurrer of William F. Scott, one of the defendants, to the bill of complaint of William Neves, complainant, and James C. Neves, complainant. This defendant, by protestation, not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of to be true, in manner and form as the same are therein and thereby set forth and alleged, says, that he is advised that there is no matter or thing in the complainant's said bill of complaint contained good and sufficient in law to call this defendant to account in this honorable court for the same; but that there is good cause of demurrer thereunto, and he doth demur thereunto accordingly, and for causes of demurrer, says, that the complainant's said bill of complaint, in case the same were true, which this defendant doth in no wise admit, contains not any matter whereon this court can ground any decree, or give the complainant any relief or assistance, against him, this defendant. Wherefore, and for divers other errors and defects in the complainant's said bill of complaint contained, and appearing on the face thereof, this defendant doth as aforesaid demur in law thereunto, and humbly craves the judgment of this honorable court, whether he is compellable or ought to make any answer thereunto, otherwise than

as aforesaid; and this defendant humbly prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

KENAN & ROCKWELL,
ROBERT M. CHARLTON,
Defendants' solicitors.

GEORGIA:

Personally appeared William F. Scott, who being duly sworn saith, that the foregoing demurrer in the equity cause of William Neves, complainant, against this defendant, and Richard Rowell, is not interposed for delay.

W. F. SCOTT.

Sworn to before me, this 15th April, 1845.
JNO. C. NICOLL, *dist. judge.*

I certify, that in my opinion this demurrer is well founded in law.
ROBERT M. CHARLTON,
For defendant William F. Scott.

April 15th, 1845.

Filed at May rules, 1845.

G. GLEN, *Clk.*

Demurrer amended by adding James C. Neves' name by consent, May 16th, 1845.

JONES.

WILLIAM NEVES, comp't,
vs.
WILLIAM F. SCOTT & RICHARD ROWELL, defendants. } In equity.

The separate demurrer of Richard Rowell, one of the defendants in the above statute case.

This defendant, by protestation, not confessing or denying all or any of the matters and things contained and set forth in complainant's bill to be true, as therein set forth is contained, that there is cause of demurrer to said bill, so far as the same relates to this defendant; and therefore this defendant doth demur, and for cause of demurrer says, that by complainant's own shewing, as appears by the statements and charges in his said bill, complainant is entitled to no discovery or relief as against this defendant, nor can any decree be rendered against him. For this, and divers other good causes, this defendant does demur to said bill, and prays the judgment of this honorable court, whether he ought to make other or further answer.

FRANCIS H. CONE,
Sol. pro def't R. Rowell.

I certify, that in my opinion this demurrer is well founded in law.
F. H. CONE,
Sol. for def. Rowell.

Affidavit waived.

JONES & BAILEY, *compl'ts' sol'rs.*

Filed May 13th, 1845.

G. GLEN, *Cl'k.*

WILLIAM NEVES & JAMES C. NEVES, complainants,
vs.
WILLIAM F. SCOTT, and RICHARD ROWELL, ex'r of John Neves, dec'd.

In this case it is agreed that the demurrers be argued on paper by the rules day in September next, 16 May, 1845.

JONES & BENNING,
And S. T. BAILEY,
Complainants' solicitors.

ROB'T M. CHARLTON,
Sol'r for F. W. Scott.

WILLIAM NEVES and JAMES C. NEVES,
vs.
WILLIAM F. SCOTT & RICHARD ROWELL. } In equity.

6th circuit court.

The agreement which forms the subject of the bill in this case was entered by John Neves and Catherine Jewell, on the eve of their marriage; they were the only parties to it, and it was founded exclusively on the consideration of marriage and other considerations, moving only between the parties themselves.

The consideration of such an agreement extends only to the husband and wife and their issue. (Osgood vs. Strode, 2 P. Wms. 245; Atherly 125, 127, 151; 2 Story's Eq. Jurisp. S. 986; Sugd. Vend. 466, 467, (5th ed.) Bradish vs. Gibbs, 3 Johns. Ch. 550; 2 Kent 172–'3;) and it is admitted by the counsel for the plaintiffs, that a volunteer, one who is not within the influence of the consideration of an executory agreement, or who does not claim through one who is, cannot seek the aid of a court of equity to enforce its performance. (Coleman vs. Sarel, 1 Ves. Jr., 50; 3 Bro. C. C. 12; 1 Fonb. 406; Story's Eq. Jur. S. 433, 973, 986; Atherly, 398–'9.)

That the instrument under which the plaintiffs ask the interposition of the court constitutes an executory, and not an executed agreement, can scarcely admit of doubt. It is in terms an executory, and not an executed agreement, and of the most informal character. It transfers no property, passes no estate, declares no trustees, and contains no word of direct and immediate conveyance, and nothing to indicate that it was a complete and actual settlement. It relates, not merely to property in possession, but to that which might be acquired in future; and the greater part of that, which is the subject of the plaintiff's bill, was

subsequently acquired, either by purchase or descent, and could not be the subject of an executed contract. The title of the plaintiffs therefore rests entirely in covenant. (Coleman vs. Sarel, 1 Ves. Jr. 54; Ellison vs. Ellison, id. 656; Antorbus vs. Smith, 12 id. 39, 46; Atherly 186.) It is an executory agreement, then, to enforce which the interference of a court of equity cannot be obtained at the instance of a volunteer.

Now the bill in this case seeks the aid of the court, upon the ground that, by the stipulations of the marriage agreement, the plaintiffs were to have the absolute and entire property after the expiration of the life estate of Neves and his wife; that the precedent estate vested in Neves and wife, the first takers under the articles, was circumscribed to, and could not endure beyond their lives; and that by the limitation over, the plaintiffs became entitled to the property, not by succession or descent as coming in *the estate* of the first takers, but as taking originally in the capacity of purchasers in their own right; in other words, that the terms under which they claim title, and by which they are designated, are words of purchase and not words designed to indicate the quantity of interest or magnitude of the estate which Neves and wife took; that consequently the interest of Neves and wife was limited to a life estate, the remainder did not become executed in possession in them, and that they, and neither of them, could by will or otherwise control or dispose of the property after the termination of their respective lives, or bar the plaintiffs; such is the aspect in which the claim of the plaintiffs is presented by their bill, and such was the construction given to the instrument by the bill instituted by Mrs. Neves, in her lifetime, in Baldwin superior court. Since then the plaintiffs, who are the brothers of the husband, Neves, are not within the influence of the marriage consideration; and since they claim to take not derivit*ably* by transmission from or through either or any of the parties who came within the influence of that consideration, they are unquestionable volunteers, and are not entitled to the aid which they seek. The view which I have taken is sustained by the authorities whose aid has been invoked by the counsel for the plaintiffs. The cases referred to by them may be resolved into three classes:

1st. It is an established principle in equity that what ought to be done shall be considered as done; "and a rule so powerful it is, as to alter the very nature of things, to make money land, and on the contrary to turn land into money; "this money articled to be laid out in land shall be taken as land and descend to the heirs." (Lechmere vs. Lord Carlile, 3 P. Wm., 215. Babington vs. Greenwood, id. 532.) It is also a well settled rule of law, which equity must follow,* (*a*) that if by one and the same instrument, a life estate is given to a person with a limitation in remainder to his heirs in fee, whether with or without the interposition of an intermediate estate, the remainder unites with the precedent life estate, and is immediately executed in possession in the per-

* (*a*) Butler, N. 249, xiv to C. L.

son who takes the life estate, who thus became seized of an immediate estate in fee. The word "heirs" is in such a case a word of limitation of the estate, and the heirs of the first taker, take not by purchase in their own right, but as standing in the place of the first taker, and embraced in the extent and measure of the estate, which he has seized. The heir takes, not originally in his own right, but through the first taker; (Shelly's case, 1 Coke R. 93.) When then it is agreed by marriage articles that money shall be laid out in lands to be settled, for example, on the husband for life, with remainder to the sons of the marriage in tail male, remainder to the daughters, remainder to the heirs of the husband forever, and the husband dies without issue; as a court of equity will, upon the application of one who has a right to pray that the agreement be executed, considers the money as land, and treat the investment as actually made in the lifetime of the husband, it regards him as seized in his lifetime of an estate in fee, which of course upon his death devolves by descent or transmission upon his heir, who succeeds through the husband to the estate thus vested in the latter, and does not become entitled to it by purchase, that is, originally in his own right. To this class may be referred Kettleby vs. Atwood, 2 Vern., 299, 471. Lancy vs. Fairchild, 2 id. 101. Knight vs. Atkyns, id. 20. Edwards vs. Countess of Warwick, 2 P. Wms., 171, 4 Bro. P. C. 494; 3 Atk. 447. Lechmere vs. Earl Carlisle, 3 P. Wms., 211. Cases T. Talbot, 80. Atherly, 126–'7, 398; 2 Powell on contracts, 104. Indeed, the only inquiry in these cases was, whether the property was to be considered land or money; in other words, whether the heir or personal representative was entitled to it; for if it were to be regarded as land, there could be no doubt that it would go to the heir. If the land had been purchased and settled in the lifetime of the husband, in the case which I have supposed, as in the cases to which reference has been made, it could not be questioned that it would have descended to the heir, whether he were a collateral or not; he would have been entitled to it as standing in the place of his ancestor, and coming within the limitation of his estate. And the ground expressly assumed by counsel, and acted upon by the court in some of the cases, was that the estate of the husband, upon whom the land was to be settled for life, and that of his heirs, constituted one and the same estate; that the remainder in fee united with the life estate; and became executed in the husband, who thus became seized of the fee; and that as a specific performance of the agreement would have been enforced at the instance of the husband, if in life, it would in like manner be enforced on the prayer of the heir who was embraced in the husband, and succeeded to his estate. (And see Co. L. 22 b.)

2. Although the consideration of marriage and a portion extends only to the husband, wife, and their issue, yet where the settlement is made through the instrumentality of a party whose concurrence is necessary to the validity of the settlement, and who insists upon a provision in favor of a person, for instance, a younger child, a collateral relative of the husband, who would not come within the consideration of marriage,

such person is held not to be a mere volunteer, but as falling within the range of the consideration of the agreement. Such are the cases of Osgood vs. Strode, 2 P. Wms., 245. Goring vs. Nash, 2 Atk., 186, to which may be added Roe e. d. Hamentor vs. Mitten, 2 Wils. 856. But these cases themselves establish that the marriage consideration alone will not support the limitation to a brother or sister, and are therefore adverse to the claim of the present plaintiffs. In Osgood vs. Strode, the father and son, each "having an interest in the premises, so that one without the other could not make a settlement thereof," on the treaty of marriage of the son, in consideration of the marriage, and of a portion paid to the son, covenanted with trustees inter alia, that the premises should be settled on the son for life, remainder to the sons of the marriage in strict settlement, remainder to the plaintiff, a grandson of the father and nephew of the son, and his heirs male, remainder to the right heir of the father. The father died, and afterwards the son and his wife, without any issue. Lord Macclesfield, in delivering his decision, said "the marriage and marriage portion support only the limitations to the husband and wife and their issue; this is all that is presumed to have been stipulated for by the wife and her friends;" but he proceeds, each of them, Lawrence Head, the father, and Edward Head, the son, having an interest in the premises, so that one without the other could not make a settlement thereof; here is now a proper person for old Lawrence Head, the father, to stipulate with his son Edward, that he, Lawrence, would come into these articles and join therein on terms that the estate should, in case of Edward's dying without issue male of the marriage, &c., then go to the plaintiff Osgood; and this was probably part of the marriage agreement, and of the terms on which it was made, though the leaving out the sons of Edward by any other marriage might be a mistake. But since this might be, and probably was, nay, appears to have been, the terms of this marriage agreement, and the inducement to old Lawrence Head to join therein, equity ought to decree the performance of it, but I will give no costs."

The grounds, therefore, on which that case was decided, was that the provision for the plaintiff came within the consideration of the agreement, which was a valuable one; the party with an estate by a party, other than the husband and wife, whose concurrence in the agreement was essential to its validity; while the case also establishes that the plaintiffs here are mere volunteers, the limitations to whom are not supported by the consideration of the agreement between Neves and his wife.

In Goring vs. Nash, 3 Atk., 186, a father seized in fee had an only son and four daughters; on the marriage of his son he entered into articles, by which he agreed to settle the estate to the uses of the marriage, with remainder to the use of Lady Goring, one of the daughters, in tail male, remainder over. The son died without issue. The father then died, and the legal fee descended upon Lady Goring and her three sisters.

No settlement having been made in pursuance of the articles, Lady G. brought her bill against her three sisters to have the articles carried

into effect. One of the grounds upon which Lord Hardwick rested his decree was, that it was a provision by a father for his daughter, (p. 189;) that it was a provision for younger children, which is always favored in a court of equity, and carried into execution; that such children are considered purchasers by reason of the natural obligation of parents to provide for their children, (191;) and the court has always decreed the provision, made by a parent for a child, to be as extensive as the parent intended it, when it does not introduce or leave the other children in distress, (p. 192). And so far from his judgment importing that a specific performance would be decreed at the instance of collaterals, the reverse is implied. The import of his remarks is, that such a decree will not be made at the instance of a collateral; but if such decree be made at the instance of a younger child, the articles will, according to the course of chancery, be carried into effect *into effect* in whole, and not in part only, and thus will be executed in favor of collaterals. He says (p. 189) all the decrees for specific performance of marriage articles on limitations for younger children are authorities in favor of the plaintiff; and where such articles have been decreed at all, they have been carried into execution, even as to collaterals, and not carried into execution in part only, (p. 190). There is no instance of decreeing a partial performance of articles; the court must decree all or none; and where some parts have appeared unreasonable, the court has said we will not do that; and, therefore, as we must decree all or none, the bill has been dismissed. "No body can tell what it is the parties who are dead have laid the greatest weight upon in coming to agreements, and therefore it would be attended with bad consequences if agreements were to be split, and one part decreed, but not another." (2 Kent, 172–'3.)

The case of Roe vs. Milton, 2 Wils., 356, where a mother interested in the estate united in a settlement making a provision for a younger son, rests upon the same principle, and is also an authority in support of the proposition that the marriage consideration alone will not sustain a limitation to brothers. See also Stevens vs. Trueman, 1 Ves. Sr., 74.

3. One of the grounds on which Ld. Hardwick placed his decision in the case of Goring vs. Nash was, that an action of law might have been brought in the name of the trustees for the recovery of damages for the non-performance of the covenant; and, therefore, to avoid the circuity of bringing such an action, and afterwards of applying to equity to have the damages invested in land, and settled according to the terms of the articles, and also because a court of law has no means of apportioning the damages according to the respective rights of the parties, equity would enforce the specific execution of the covenant. And it is upon this ground that Lord King principally rested his decree in the case of Vernon vs. Vernon, 2 P. Wms., 594; see also 3 Atk., 190; Stephens vs. Trueman, 1 Ves. Jr., 74; Williams vs. Codington, id. 513, argo. But such a ground is treated as forming an exception to the general rule, (1 Ves. Sr., 74,) and leaves this and other cases, where the same ground does not exist, subject to the operation of the rule. There are other

circumstances which contributed to influence the decision in the case of Vernon vs. Vernon. The eldest brother of the family had bequeathed a large personal estate to the husband, with a limitation over to the plaintiffs, his other brothers, upon a contingent event, which, making the limitation void, vested the husband with the absolute and entire interest; and Lord King thought that the husband might be induced to enter into the covenant to make to the plaintiffs some recompense or satisfaction *or satisfaction* for what was intended them by the bequest. The father also was a party to the articles, and it appears from the report in 4 Bro C. 31, "insisted upon the provision for the plaintiffs, and afterwards declared that it should never have been a match, if the wife and her friends, as well as the husband, had not agreed to make the settlement in that manner;" thus assimilating it to the second class of cases which I have enumerated. But to whatever of these grounds the decision in Vernon vs. Vernon may be referred, it must be obvious that that case can be considered as an authority only in cases similarly circumstanced.

Within no one of these classes does the case under consideration fall. There exists nothing, therefore, to relieve it from the operation of the general rule, that the performance of a contract will not be enforced at the instance of a volunteer. And since the consideration of marriage, or a portion, or other consideration, moving only between husband and wife, (and no other consideration exists here,) will not extend beyond the husband and wife and their issue, and collaterals and all other persons are mere volunteers; the plaintiffs in this case, who are such collaterals, are not entitled to the aid which they pray.

The demurrer is therefore allowed.

JNO. C. NICOLL.

Filed 13th April, 1846.

G. GLEN, *Cl'k.*

In the sixth circuit court of the U. S. for the district of Georgia. In equity.

WILLIAM NEVES, and JAMES C. NEVES, complainants,
and
WILLIAM F. SCOTT & RICHARD ROWELL, defendants.

The matter of the demurrers, put in by the defendants to the plaintiffs' bill, having been argued upon written and printed briefs submitted by their respective solicitors, (in pursuance of the written agreement entered into between the said respective solicitors,) and the same being to the whole of the plaintiffs' bill, the defendants, by the said demurrers, insisting that there was no matter or thing in the complainants' said bill of complaint contained good and sufficient in law to call the defendants to account in the said court for the same, and that the said complainants' said bill of complaint contained not any matter whereon the said court

could ground any decree, or give the complainants any relief or assistance against the defendants, the court held the said demurrers to be good and sufficient, and therefore do order that the same do stand and be allowed; and that the said defendants are entitled to their costs.

April 13, 1846.

Filed April 13th, 1846.

GEO. GLEN, *Cl'k.*

UNITED STATES OF AMERICA,
District of Georgia:

Know all men by these presents, that we, William Neves, and Seaborn Jones and Samuel T. Bailey, securities, are held and firmly bound unto William F. Scott and Richard Rowell, in the full and just sum of three hundred dollars, money of the United States of America, to be paid to the said William F. Scott and Richard Rowell, or their certain attorney or attorneys, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 16th day of Oct., in the year eighteen hundred and forty-six.

Whereas the said William F. Scott and Richard Rowell have obtained a decree in equity in the circuit court of the United States, for the sixth circuit and district of Georgia, against the said William Neves and James C. Neves, with which decree they the [said] William Neves and James C. Neves are dissatisfied, and are desirous to appeal therefrom to the Supreme Court of the United States; now, the condition of this obligation is such, that if the said William Neves and James C. Neves, appellants, shall prosecute their appeal to effect, and answer all damages and costs, if they shall fail to make their plea good, then this obligation to be void, otherwise to be and remain in full force and virtue.

WILLIAM NEVES, [L. S.]
SEABORN JONES, *Security*, [L. S.]
S. T. BAILEY. [L. S.]

Sealed and delivered by William Neves, and Seaborn Jones, security.

LOTT WARREN, *Judge*
Sup'r court, S. W. C.

Test as to S. T. Bailey,

JOHN J. FLOYD, *J. S. C.*

Approved: JNO. C. NICOLL, *Dis. judge.*
Filed 13 Nov. 1846. G. GLEN, *Clk.*

DISTRICT OF GEORGIA, *to wit:*

The United States of America, to William F. Scott and Richard Rowell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, in the District of

Columbia, on the first Monday in December next, to shew cause, if any there be, why the decree rendered against William Neves and William C. Neves, in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the honorable John C. Nicoll, judge of the district court of the United States, for the district of Georgia aforesaid, this thirteenth day of November, 1846.

JNO. C. NICOLL, *Dist. judge.*

We acknowledge service of a copy of this citation, November 16th, 1846.

KENAN & ROCKWELL,
Atty's for W. F. Scott.
CONE & HARRIS,
Att'ys for R. Rowell.

Filed Dec. 12, 1846. G. GLEN, *Clk.*

Copy of original attached to record sent to S. Jones, esq., at Washington, D. C., Dec. 15, 1846. G. G.

UNITED STATES OF AMERICA,
District of Georgia:

I, George Glen, clerk of the circuit court of the United States, for the sixth circuit and district of Georgia, do hereby certify, that the foregoing writing contains a true copy of the record and proceedings in the cause therein mentioned, taken from and by me carefully compared with the originals, being of file and of record in my office.

In witness whereof, I have hereto set my hand and affixed the seal [L. S.] of the said court, this first day of February, A. D. 1847.

GEO. GLEN, *Clk.*

I, John C. Nicoll, judge of the district court of the United States for the district of Georgia, hereby certify, that the attestation of George Glen, clerk of the circuit court of the United States for the sixth circuit and district aforesaid, is in due form.

Witness my hand this first day of February, A. D. 1847.

JNO. C. NICOLL,
Dist. judge for the district of Georgia.

STATE OF GEORGIA,
Chatham county:

Personally appeared George Glen, who being sworn said, that on Tuesday, the fifteenth day of December last, he placed in the post office in the city of Savannah, a package directed to the honorable Seaborn Jones, Washington, District of Columbia, containing a transcript of the proceedings in a cause in equity in the circuit court of the United States for the district of Georgia, wherein William Neves and William C. Neves were complainants, and William F. Scott and Richard Rowell were defendants, and in which the complainants had entered an appeal to the Supreme Court of the United States; that said transcript contained the original citation signed by the honorable John C. Nicoll,